No. 03-228

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRIAN JONES,

Petitioner,

—v.—

JOHN KEANE, SUPERINTENDENT,
WOODBOURNE CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did petitioner's claim that the prosecution failed to adduce sufficient evidence to support his conviction for murder fairly present to the state courts, for exhaustion purposes, his later claim in a federal habeas corpus proceeding that the New York statutory scheme distinguishing between depraved indifference murder and reckless manslaughter was unconstitutionally vague and violated the Due Process Clause and the Eighth Amendment?

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No. 03-228

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2003

BRIAN JONES,

Petitioner,

-against-

JOHN KEANE, SUPERINTENDENT,
WOODBOURNE CORRECTIONAL FACILITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The State Court Proceedings

On December 20, 1996, petitioner Brian Jones was convicted in New York State County Court, Orange County, of

Depraved Indifference Murder under New York Penal Law §125.25(2), Criminal Possession of a Weapon in the Second Degree under Penal Law §265.02, and Criminal Possession of a Weapon in the Third Degree under Penal Law § 265.03. These convictions arose out of an altercation during which petitioner fired two shots at the victim, Germaine Fields, after a verbal confrontation over a mutual girlfriend.

At trial, petitioner claimed that the victim had threatened to kill him, that he was overcome with fear, and that he did not intend to kill the victim when he fired. At no time prior to or during the trial did petitioner argue, as he later did in federal court, that New York's depraved indifference murder statute was unconstitutionally vague or that the distinction between depraved indifference murder and reckless manslaughter under New York law was so insubstantial as to violate the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

On appeal to the New York State Appellate Division, Second Department, petitioner argued solely that the People had failed to prove his guilt at trial beyond a reasonable doubt. *See* Brief for Defendant-Appellant, Appellate Division, Second Department, at 9-10. Reciting the core element of depraved indifference murder under New York law, he argued that the evidence showed that petitioner had not acted "under circumstances evincing a depraved indifference to human life" because when the shots were fired, petitioner was reasonably in fear of the victim, whom he characterized as a "vicious neighborhood bully," and that the victim was responsible for the confrontation. *Id.* Petitioner did not at any point challenge the depraved indifference murder statute as unconstitutionally vague, or the statutory scheme as a violation of the Eighth Amendment, Equal Protection, or substantive Due Process.

Nor did petitioner cite to any cases involving vagueness, the Eighth Amendment, or Equal Protection challenges, or to any provision of the constitution whatsoever. Similarly, petitioner did not argue that there existed no meaningful distinction between the crimes of depraved indifference murder and reckless manslaughter under New York law, or that he was adversely affected in any way by the state's failure to draw an adequate distinction.

The Appellate Division, in affirming the conviction, held that petitioner's guilt of depraved indifference murder was established by legally sufficient evidence and that the verdict was not against the weight of the evidence. *People v Jones*, 266 A.D.2d 236, 696 N.Y.S.2d 902 (2d Dept. 1999). Thereafter, petitioner expressly limited his application seeking leave to appeal to the New York Court of Appeals to the question of legal sufficiency. *See* Letter Application for Leave to Appeal to the Court of Appeals, at 1. He referred to his Appellate Division brief and asserted that "the conviction should be reversed because the People failed to prove beyond a reasonable doubt that Mr. Jones committed depraved indifference murder." The Court of Appeals denied leave on May 24, 2000. *People v Jones*, 95 N.Y.2d 798, 733 N.Y.S.2d 238 (2000).

After his direct appeal, petitioner also moved to vacate judgment and for a writ of error coram nobis in the Appellate Division. Petitioner again did not raise any constitutional challenge to the depraved murder statute in either application.

The Federal Court Proceedings

In March of 2002, petitioner filed a petition for a writ of habeas corpus in United States District Court for the Southern District of New York. Petitioner argued again that the prosecution failed to establish his guilt beyond a reasonable doubt, but this time added separately that the depraved indifference murder statute was unconstitutionally vague, and violated the Eighth Amendment and the Due Process Clause, owing to "confused and contradictory" interpretations by the New York Court of Appeals. *See* Habeas Corpus Petition, No. 02-CV-1804, filed in United States District Court, Point One.

According to petitioner, under New York Court of Appeals precedent, there existed no meaningful distinction between depraved indifference murder and reckless manslaughter. The crux of the problem, according to petitioner, was that the Court of Appeals, in a long line of decisions beginning with *People v. Register*, 60 N.Y.2d 270 (1983), 469 N.Y.S.2d 599, *cert. denied*, 466 U.S. 953 (1984), had eliminated the common law requirement of depraved indifference murder that the actor possess a state of mind reflecting "a wickedness akin to that of one whose conscious objective is to kill." Pet. Point One, unnumbered page (quoting *Register*, 60 N.Y.2d at 286). Without this element, the only distinction under New York law between depraved indifference murder and reckless manslaughter, according to petitioner, was that the former required a "very substantial risk" of death and the latter a "substantial risk." This distinction, the argument proceeded, was so insubstantial as to render the depraved indifference murder statute unconstitutionally vague because it allowed prosecutors and judges to arbitrarily prosecute some people for the more serious crimes and others for the lesser

crimes. *Id.*; *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (quoting *Smith v. Goguen*, 415 U.S. 566, 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 [1974]).

The state responded that petitioner had failed to present his constitutional challenge to the state courts on direct appeal, as required by exhaustion principles, and that, because he no longer had any claim available in state court, this contention was procedurally barred from review in federal court. *See* Memorandum of Law in Opposition to Petition, Point One. The state also argued that state law adequately distinguished between the two crimes and that petitioner had failed to establish any constitutional violation in the state's statutory scheme.

The District Court granted the petition. The court acknowledged that petitioner had not presented his constitutional challenge to the New York state courts, but held that petitioner's state court argument that the evidence was insufficient to support his guilt satisfied the exhaustion requirement because it was "inextricably intertwined" with the federal constitutional claim (11a).[1] The court also concluded that sending petitioner back to state court would be futile because the Court of Appeals had decided that a distinction did exist between the two statutes, over the strenuous dissents of Judges Jasen and Bellacosa in *People v. Register* and

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[1]While petitioner's appendix to his petition reproduces portions of the District Court order, it has omitted almost the entire discussion of the exhaustion issue and some discussion of the merits. The full opinion is reproduced in the Appendix to this Brief in Opposition.

subsequent decisions, and that "if they [the state courts] won't listen to Judge Bellacosa and they won't listen to Judge Jasen, then they won't listen to Brian Jones" (Pet. App. at 10a).

On the merits, the court concluded that the New York Court of Appeals had eliminated any meaningful difference between depraved indifference murder and reckless manslaughter, reducing the distinction to the difference between a "substantial risk" of death and a "very substantial risk" of death. The court concluded that a trial jury could not "slice the salami that fine," and, without citing any authority, determined that the failure to distinguish between the two crimes violated both the Equal Protection Clause and substantive Due Process (10a).

The state appealed to the Second Circuit Court of Appeals, arguing that the District Court erred in concluding that petitioner's legal-sufficiency claim in state court fairly presented his later constitutional challenge to the statutory scheme. *See* Respondent's Brief to Second Circuit Court of Appeals at 16-28. The state argued that, in his legal sufficiency claim, petitioner had presented only the issue of whether the jury had properly rejected his claim of self-defense, and he had not alleged that the elements of the crime were vague or challenged the constitutionality of New York's depraved indifference murder statute or the distinction between that statute and the reckless manslaughter statute. Because petitioner had failed to exhaust the claim, and because he could no longer return to state court to do so, his claim was procedurally barred from review. The state also argued that the New York Court of Appeals had provided more of a distinction between the two statutes than the District Court recognized, and that the distinction was sufficient to pass this Court's Equal Protection and Due Process tests. *Id.* at 32-57.

The Second Circuit reversed the District Court decision, holding that petitioner had failed to present his constitutional challenge to the depraved indifference murder statute to the state courts. *Jones v. Keane*, 329 F.3d 290 (2003). The court noted that, to satisfy the exhaustion requirement, the claim presented to the state courts must be the "substantial equivalent" of the claim presented in federal court. *See Picard v. Connor*, 404 U.S. 270, 278 (1971). The court then noted that, in state court, petitioner did not challenge the statute or raise any dispute as to what constituted the elements of the crime, but argued only that the evidence presented in his case did not meet the established definition of the crime. 329 F.3d at 295-96. The court further noted that in his appellate brief, petitioner recited the elements of the crime without indicating any concern that they were unconstitutionally vague. *Id.* Petitioner therefore had failed to raise his constitutional challenge to the crime of depraved indifference murder in state court, and consequently failed to satisfy the exhaustion requirement. *Id.* Because petitioner could no longer return to state court to raise his constitutional challenge, and because petitioner had not attempted to establish cause and prejudice or a miscarriage of justice, his claim was barred in federal court. *Id.* at 296.

Petitioner subsequently sought a writ of certiorari in this Court. For the reasons stated below, further review of this issue is unwarranted.

REASONS FOR DENYING THE WRIT

In this Court, petitioner seeks review of his contention that his state court claim that the prosecution failed to prove his guilt of depraved indifference murder at trial fairly presented his later federal claim that the state law defining the offense and

distinguishing it from reckless manslaughter was unconstitutionally vague and violated the Due Process and Equal Protection Clauses of the Constitution. But, in seeking certiorari, petitioner presents this Court with no split of authority between federal circuit courts or between a state court of last resort and a federal circuit court on a similar issue, and does not contend that the Second Circuit failed to apply the correct legal standard or rule of law as set forth in any decision of this Court. Indeed, in his argument in support of review here, petitioner agrees with the standard applied by the Second Circuit – that the state claim must be the "substantial equivalent" of the federal claim – but contends merely that the lower court misapplied this standard to the specific facts of this case. Because this question does not present a legal question of importance or an issue likely to recur with great frequency, it does not merit this Court's review.

Moreover, as explained below, the Second Circuit correctly applied the law to petitioner's case: his state court claim that the proof at trial was insufficient failed to raise a constitutional challenge to the way in which New York defines the crime of depraved indifference murder or distinguishes it from any other offense. Indeed, the constitutional claim was fundamentally different from, and far broader in consequences than, the claim he raised in state court. And this is true both from a procedural and substantive standpoint. Thus, the Second Circuit decision does not require further review.

A. Petitioner's Claim Presents No Substantial Legal Question Meriting this Court's Review, But, Rather, Argues a Misapplication of the Agreed-Upon Legal Standard to the Peculiar Facts of this Case.

In seeking review, petitioner fails to raise a substantial question over the legal standard or rule of law to be applied in his case. Indeed, he agrees with the Second Circuit and respondent on the test to be applied, arguing only that, under the particular facts of his case, his state court filing was sufficiently similar to his federal filing to warrant a different conclusion than that adopted by the Second Circuit. The failure to contest the legal standard to be applied and petitioner's heavy reliance on the specific facts of his case, which are relatively peculiar and not of widespread applicability, render his petition unworthy of review here.

In his petition, petitioner acknowledges that he was required by this Court's precedent to exhaust his state court remedies before attempting to raise in a habeas corpus petition his constitutional challenge to the state's definition of depraved indifference murder and reckless manslaughter. Pet. at 18. He also acknowledges that this required him to "fairly present" his claim to the state courts and that he could only do this by arguing there the "substantial equivalent" of the claim later raised in his habeas petition. Pet. at 18-19. Indeed, he specifically adopts the "substantial equivalent" standard as the applicable test and argues that he met it. Pet. at 19. ("Petitioner's insufficiency-of-the-evidence claim was the 'substantial equivalent' of his federal constitutional claim to the state courts."). Moreover, petitioner does not contend that the Second Circuit applied a different standard, as indeed it did not. *Jones v. Keane*, 329 F.3d at 294-95. ("The claim presented to

the state court . . . must be the "substantial equivalent" of the claim raised in the federal habeas petition").

Petitioner, then, does not argue that the Second Circuit used or created an erroneous legal standard or test, or that it adopted a rule of law in conflict with any decision of this Court or any other federal circuit court. He argues merely that the Second Circuit misapplied the agreed-upon test to the particular facts of his case. He argues, in essence, that his argument as it appeared in his brief to the New York State Appellate Division was sufficiently similar to argument he made in his federal habeas petition to satisfy the standard that he acknowledges applies to him. This fails to present an issue worthy of review in this Court.

Indeed, as this Court's rules make clear for all petitioners, "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. This is because such arguments do little more than present "fact-bound issue[s] of little importance since similar situations are unlikely to arise with any regularity." *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984). This is precisely the type of limited fact-bound claim petitioner wishes to raise here.

Nor is the factual scenario in this case so common that a ruling on it might prove useful in a great many other cases or might even merit its own, more specific, legal standard or rule. Unlike, for example, the currently pending case of *Baldwin v. Reese*, No. 02-964, which concerns an all-too-common claim of ineffective counsel – a claim that is almost invariably raised in similar terms in both state and federal court – this case raises a relatively rare claim. Indeed, while ineffectiveness claims of one

form or another appear in almost every habeas petition, it is unlikely that petitioner's factual scenario, in which he has attempted to convert a mere legal sufficiency claim into a federal constitutional challenge to the entire statutory scheme at issue, will frequently recur. Petitioner's claim, therefore, does not promise the same widespread applicability that *Baldwin* does.

Moreover, the *Baldwin* case presents a legal issue not present here: whether a petitioner who makes the identical allegations in state and federal court must invoke the federal constitution in state court to obtain review in federal court. Indeed, the habeas petitioner in *Baldwin* presented the identical allegations of ineffectiveness in both courts, and the issue presented in this Court revolves around whether the state court was alerted to the federal constitutional nature of the claim. *See* Brief for Petitioner, *Baldwin v. Reese*, No. 02-964 at i. Here, by contrast, petitioner did not make the same underlying allegations in state and federal court. While he alleged in state court that the evidence was insufficient to prove his guilt, he argued in his habeas petition that the entire statutory scheme was constitutionally invalid. In other words, while the issue in *Baldwin* concerns whether the habeas petitioner invoked the federal constitution in state court to resolve the identical allegations, the issue here is whether the underlying allegations are the same at all. Thus, whatever the outcome of the far more subtle issue in *Baldwin*, here, as petitioner recognizes, the appropriate test is the "substantial equivalent" test, a test which, as explained below, petitioner clearly fails. Because petitioner has not challenged the test applicable to his case, and because both the issue and the facts in *Baldwin* are so different from this case, *Baldwin* would ultimately shed little light on this matter.

In short, petitioner has raised no substantial legal issue in this Court, but only asserts a misapplication of accepted law to the facts of his case. This limited issue is simply not of sufficient significance to warrant this Court's review.

B. The Second Circuit Correctly Applied the Law to the Facts of Petitioner's Case.

Petitioner is also incorrect in arguing the limited issue that he presents for this Court's review. Contrary to petitioner's position, the Second Circuit correctly decided that his state court claim that the prosecution failed to adduce sufficient evidence of his guilt was not the "substantial equivalent" of his constitutional challenge to the way in which New York defines the crime of depraved indifference murder and distinguishes it from reckless manslaughter. At a minimum, the claims are different because the proof-of-guilt claim requires only an evaluation of the evidence in his case while the constitutional challenge requires an analysis of the scope of the statutory scheme as a whole, as well as an analysis of the constitutional requirements for, and limitations on, the power of the states to define crimes under state law. Thus, the former claim simply does not implicate the latter. For this reason, the Second Circuit decision did not unfairly preclude review of petitioner's federal claim and does not require the intervention of this Court.

In order to determine whether petitioner presented the same claim in state and federal court, it is necessary to review his filings in each court. In state court, petitioner acknowledged that the statute required that the state establish that he acted under circumstances evincing a depraved indifference to human life, and argued that, the state had failed to do so because the evidence showed only that he was a young man who had acted out of fear and immaturity. Even then, petitioner primarily

argued that the jury had wrongly rejected his claims of self-defense, and as such, the verdict was against the weight of the evidence, a state law claim. *See* C.P.L. § 470.15(5). In federal court, petitioner attacked the constitutionality of the definition of the crime of depraved indifference murder and the state scheme distinguishing that crime from reckless manslaughter. He argued that through a gradual erosion over a period of years and through numerous decisions, the Court of Appeals had eliminated the common law element of the crime that requires that the actor possess a state of mind reflecting a "wickedness akin to that of one whose conscious objective is to kill." Habeas Corpus Pet. Point One, unnumbered (quoting *People v. Register*, 60 N.Y.2d at 286); *see also Jones v. Keane*, 329 F.3d at 293. According to petitioner, the only distinction between the crime of depraved indifference murder and reckless manslaughter was that the greater crime required a "very substantial risk" of death and the lesser only a "substantial risk." Petitioner then argued that the Constitution requires that states provide a more meaningful distinction than this in defining crimes. The "failure of the [depraved indifference] statute to adequately define the more serious mens rea" creates the constitutionally unacceptable risk, according to petitioner, that "prosecutors and juries [will] arbitrarily and erratically determine which crime to prosecute or to apply." Appellee's Brief to Second Circuit (citing *Kolender v. Lawson*, 461 U.S. 352, 358 [1983]). As a result, the state scheme distinguishing between non-intentional murders violated the Due Process Clause, the Eighth Amendment, and, as the District Court found, the Equal Protection Clause.

Under these facts, petitioner's state court claim was not the substantial equivalent of his federal constitutional claim. In his state court claim, petitioner accepted the state definition of depraved indifference murder. He made no attempt to challenge

the definition, or to point out that the state had improperly eliminated an essential element of the common law crime, or to compare the elements of depraved indifference murder with those of reckless manslaughter. Even more significantly, petitioner did not identify, much less attempt to apply, any constitutional requirements that might limit the way in which states may define and distinguish among crimes. There would, then, have been no reason for the state court to have questioned the prevailing definition of the crime of depraved indifference murder or to have examined the constitutional limitations involved. By contrast, in federal court, petitioner attacked the definition of the crime as constitutionally erroneous, argued that the state could not eliminate a common law element of the crime, and insisted that the two statutes were indistinguishable and that the Eighth Amendment and Due Process Clause forbid such an event.

In the end, the very nature of the complaint was altered on a fundamental level. The essence of the federal claim was that *no one* could properly be convicted under the statute because it is arbitrary and discretionless. In state court, petitioner accepted the definition of the statute and merely alleged that *he personally* was not properly convicted based on the proof adduced at his trial.

Furthermore, had the constitutional challenge to the depraved murder statute been raised, the state would have had meaningful defenses to it under the facts of this case that it never had the opportunity to raise. For example, the state could have raised two dispositive procedural arguments that would have precluded review in state court and acted as independent and adequate state grounds barring review in federal court. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). Had the issue been raised, the state would have argued that petitioner had failed to

preserve the issue for review because he never raised it in the trial court through an appropriate pre-trial motion. *See, e.g., People v. Davidson*, 98 N.Y.2d 738, 751 N.Y.S.2d 161 (2002)(constitutional challenge to statute unpreserved because not specifically raised as such in the trial court); *People v. Voliton*, 83 N.Y.2d 192, 195-96, 608 N.Y.S.2d 945 (1994)(same). The state would also have noted that state law requires that any litigant challenging the constitutionality of a state statute notify the Attorney General, so that he may take appropriate action and intervene if warranted, C.P.L.R. 1012[b]; Executive Law §71, and in the absence of such notice, the constitutional challenge is not reviewable. *See McGee v. Korman*, 70 N.Y.2d 225, 231-32, 519 N.Y.S.2d 350 (1989); *Matter of Rivera v Cassas*, 275 A.D.2d 417, 713 N.Y.S.2d 689 (2d Dept. 2000). Additionally, because the claim was not raised in the trial court it was unpreserved and could not be properly included for the first time in his application for leave to appeal to the New York Court of Appeals. 22 N.Y.C.R.R. § 500.10(a); *see People v. Davidson, supra*. But the state had no opportunity to advance these arguments because the constitutional challenge to the statute was never raised in state court. Similarly, because petitioner expressly limited his leave application to the New York Court of Appeals to the issue of legal sufficiency, his constitutional challenges were not exhausted for this additional reason. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). For these reasons, and because these procedural bars would have precluded review in federal court, petitioner's state law claim cannot be deemed to have fairly presented his constitutional challenge to the state courts.

In short, petitioner failed to present to the state court not only the essential underpinnings of his legal challenge, but also the very nature of it: that the state had unconstitutionally defined the crime of depraved indifference murder. Because the state

court was not alerted to that issue and did not consider it, and because the state could have raised other defenses to such a challenge, the Second Circuit was correct in finding that petitioner had failed to present his federal habeas claim to the state courts.

Petitioner nevertheless argues that his sufficiency-of-the-evidence claim properly presented his constitutional challenge to the state statutory scheme for review in the state courts. He argues that his legal-sufficiency claim was adequate to raise a constitutional due process issue because state law adopts the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), for legal-sufficiency claims, and that, state convictions that do not comply with that standard violate the Due Process Clause. Pet. at 19-20. He also points out that in order to decide the legal sufficiency issue, the state was required to distinguish between depraved indifference murder and reckless manslaughter. Pet. at 20. Neither of his arguments establishes, however, that the state court claim was the equivalent of the federal one.

As to the first argument, petitioner mistakenly assumes that all Due Process claims are the same. He argues essentially that because one Due Process claim may have been raised in state court, any other claim he could construct that might fall within the Due Process Clause could also be raised. This cannot be true. As this case forcefully demonstrates, the Due Process Clause encompasses a vast range of claims, spanning every form of procedural and substantive Due Process that this Court has enunciated over many decades. State courts faced with one Due Process claim do not, and could not, consider every other possible claim that could be deemed to invoke the Due Process Clause. Thus, the fact that the Due Process Clause has been invoked to raise one claim does not mean that every other claim

that may invoke the Due Process Clause is its substantial equivalent.

As to the second argument, while the state court had to understand the difference between depraved indifference murder and reckless manslaughter under state law in order to decide if the proof of guilt was sufficient, it did not have to consider whether the state's distinction between the two crimes was constitutionally adequate. Indeed, the state court undoubtedly believed that it understood the state law definition of depraved indifference murder and how it differed from reckless manslaughter, but, in the absence of a challenge to the constitutionality of the distinction, it had no occasion to investigate whether that distinction was sufficient to pass muster under the Due Process and Equal Protection Clauses. In the absence of a constitutional challenge to the statute, the court needed merely to accept the distinction as stated in the state statute and caselaw; it was not required to question whether the state had the right, under the constitution, to define the distinction the way it did.

Thus, while both claims touch upon the distinction between the two crimes, that is where their similarity ends. For the legal-sufficiency claim, the legal analysis consists of recognizing and accepting the distinction, and applying it to the proof at trial. The constitutional claim, by contrast, requires not only recognizing the distinction, but examining the very power of the state to define the crime the way it did. The state court here, presented with solely a legal-sufficiency claim, simply had no occasion to consider the much more complex and different constitutional issues.

Petitioner also argues, however, that he did no more between state and federal court than "re-formulate" his claim

and add a new legal theory to support the same result. Pet. at 20-21. According to petitioner, his "argument concerning the unconstitutionality of the statutory scheme is simply additional legal support to his insufficiency/due process argument and not a separate independent challenge." Pet. at 21. But petitioner did much more than add legal support to his claim. He changed the claim at its foundation, altering his initial argument – that the proof in his case was inadequate because it showed that he acted out of a reasonable fear for the victim – to one that attacked the statute as a whole and argued, as a matter of constitutional law, that no one could properly be convicted under the state statutory scheme. Moreover, the only way in which both claims can be seen to support the same conclusion at all is that they were both advanced in support of reversal. This alone cannot be enough to establish that petitioner merely altered his "legal theory." Many different grounds may be advanced in support of reversal, but they are not all merely different legal theories that raise variations of the same claim. Thus, this argument too is insufficient to establish that petitioner raised the same claim in state and federal court.

The lack of merit in petitioner's current arguments in favor of exhaustion is further demonstrated by this Court's decision in *Anderson v. Harless*, 459 U.S. 4 (1982) (per curiam). In that case, the petitioner argued in state court that the trial court's instruction on malice was erroneous, and relied on a state case that asserted a broad due process right to instructions that properly explain the law. *Id.* at 6-7. In federal court, petitioner argued that the malice instruction violated due process because it unconstitutionally shifted the burden of proof on this critical issue. *Id.* Even though the precise same instruction was involved on state and federal review and even though the state caselaw the petitioner relied upon and the federal claim both invoked due process, this Court held that the

claims were not the same for exhaustion purposes. *Id.* Similarly here, while both claims arguably involved the distinction between the two statutes and even invoked the Due Process Clause, the claims were otherwise wholly different. Thus, the federal-court claim here, like the one in *Harless*, was not merely "re-formulated," it was fundamentally different.

In sum, the Second Circuit correctly determined that petitioner's state brief had not presented the same claim as the constitutional claim he made in federal court. While both claims arguably invoked due process in some sense and required some understanding of depraved indifference murder under New York law, this alone was insufficient to establish that these two fundamentally different claims were one and the same. Moreover, because petitioner has not challenged the legal standard used by the Second Circuit, this case presents no substantial legal issue for this Court's review.

CONCLUSION

The issue raised by petitioner presents no legal question of importance for this Court's review, but raises at most a question of misapplication of an agreed-upon standard to the unusual facts of this case. For this reason, and because the Second Circuit's conclusion was ultimately correct and eminently fair, a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BRIAN JONES,

Petitioner,

02-Civ-1804 (CLB)

-against-

MEMORANDUM OF LAW

JOHN KEANE, Superintendent, etc.,

Respondent.

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Brieant, J.

By his counseled petition docketed March 6th, 2002, Mr. Brian Jones, a state prisoner seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The following sets forth the findings of fact and conclusions of law of this Court, based solely upon the official record. The petition is timely and, as noted below, all claims have been subject to exhaustion, although the latter points is in dispute.

After a jury trial conducted before County Judge Patsalos of Orange County, Petitioner was convicted of murder in the 2nd degree, (depraved indifference murder) under Section 125.25(2) of the New York Penal Law and also of related weapons offenses in connection with the murder. The jury acquitted him of intentional murder under Section 125.25(1).

On the evening of June 17, 1996, at 11:00 p.m. in the City of Newburgh, Orange County, New York, the Petitioner fired two shots which killed Germaine Fields, an eighteen year old male who had engaged in a street fight with Petitioner and others. Ms. Fields died. Mr. Jones fled but was arrested the following morning.

On December 20, 1996, the Court sentenced Petitioner on three different counts, the longest of which is nine years to life. The conviction was affirmed on direct appeal (*People v. Jones* 266 AD 2d 636) and leave to appeal was denied by the New York Court of Appeals on May 24, 2000 (*People v. Jones* 95 NY 2d 798). Thereafter, the Petitioner commenced a *coram nobis* proceeding in the Appellate Division claiming for the first time that he had been denied effective assistance of Appellate Counsel. He also moved in the County Court under New York CPL § 440.10, to vacate the judgment because of ineffective assistance by trial counsel. Both of these applications were denied, and leave to appeal from the denial of the Section 440.10 motion was denied by the Appellate Division on February 20th, 2002.

The Jury Challenges

The Petition alleges as a separate ground for relief that the Petitioner's trial attorney was ineffective because he failed to exhaust Petitioner's peremptory challenges and the appellate attorney was ineffective in failing on direct appeal to raise the jury selection issue. A juror, Shirley Grammas, was challenged for cause by defense counsel after she had told the Court that she hoped she would not be selected, and that she had diabetes and high blood pressure and feared that her sugar level and blood pressure might increase if she were involved in a verbal disagreement with other jurors, and that if she became

emotionally upset, she might not be able to serve. There was no indication of bias, or that Ms. Grammas could not give a fair and impartial verdict.

Although the prosecutor did not oppose this challenge for cause, it was denied by the trial judge at a time when defense counsel had one peremptory strike remaining. The ineffective assistance is said to arise from the fact that Counsel did not peremptory strike Juror Grammas who became the twelfth member of the panel. The next prospective juror was sworn in as the first alternate without any challenge from Defense Counsel. This point is mentioned by Petitioner as supporting an inference that the Trial Court did not fail to exercise his last peremptory because he was concerned over the suitability of the next prospective juror.

No issue involving jury selection was raised by Appellate Counsel and, indeed, Appellate Counsel was not in possession of the transcript of the proceedings during which the jury was selected. The real point is that the trial judge had arguably denied improperly two previous challenges for cause, thereby forcing defense counsel to use two peremptories. In order to preserve these arguably erroneous rulings for appellate review, counsel had to exhaust all his peremptory challenges. This he did not do.

This issue is without merit. To prevail on such an issue, Petitioner must show cause and prejudice. There is no prejudice. The two prior challenged jurors did not serve, and there is no reason to find bias on the part of Ms. Gammas, who simply did not want to serve in a contested trial because of concern over her medical condition, tainted the verdict in any way.

The Incident

Viewed most favorably to the Prosecution, the trial record shows that Petitioner, age 15 at the time of the event, was engaged in a sexual relationship with Latoya Williams, another minor, who was expecting Petitioner's child. Two or three days prior to the event, Miss Williams had informed Petitioner that Germaine Fields had expressed an intention to stab Petitioner in the stomach. Petitioner had accused Fields of "coming on" to his girlfriend. Fields, a recent arrival in the community and purportedly a member of the Crips street gang, denied doing so.

On the evening of June 17, 1996, at about 11:00 P.M., in the street, three or four doors from Miss Latoya Williams home, she and Petitioner was in conversation, when Fields appeared out of the darkness and began cursing the Petitioner. Latoya's father, John Smith, entered the discussion. The confrontation escalated and ultimately Miss Williams and Fields became entangled in a struggle and both fell to the sidewalk with Latoya on top, being held by Fields. Petitioner shot Fields twice, from a distance of two feet pointing the gun downward at him while he was lying on the sidewalk on his back.

A large number of witnesses testified to having observed all or part of the crime. There was no credible evidence that the deceased was armed, although Petitioner testified he thought this to be the fact. It was clear that a violent fight was in progress immediately prior to the shooting, in which Fields was the aggressor. Both bullets struck Mr. Fields in the neck. He arrived at the emergency room of St. Luke's Hospital without a pulse and not breathing and died either on or directly prior to arrival. On the early morning of June 18th, 1996, Petitioner was arrested at a motel in Poughkeepsie, registered under a false name.

The Challenge to the Statute

Petitioner testified in his own defense that he had been threatened by Fields and told to leave the scene or he would get killed. He said that he thought Fields had a gun and was reaching for an object in his pocket which appeared to be a weapon, while Fields was on the ground holding on to Latoya Williams. As soon as Fields' had entered his pocket, Petitioner fired. Petitioner asserted that he was afraid Fields was going to kill him and was concerned that Latoya had been hurt by Fields. He claimed that at the time he fled he did not know whether Fields had been hit by either bullet. Petitioner testified that he was not trying to kill Fields but was just trying to hurt him. The jury is deemed to have rejected the contention of Petitioner that this intentional shooting was in self defense.

After all the evidence had been received, the defense asked the Trial Judge to charge the lesser included offense of criminally negligent homicide, New York Penal Law § 125.15, but this application was denied. As noted earlier, Mr. Jones was acquitted of intentional murder but found guilty of depraved indifference murder and the two weapons counts.

Sub-paragraph 2 of Section 125-25 of the New York Penal Law under which Petitioner was convicted defines an alternate version of murder in the second degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." In contrast, Section 125.15 of the Penal Law which defines manslaughter in the second degree, reads in relevant part, as follows:

"A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person."

Petitioner argues as his second claim, that as a matter of constitutional law, there is no statutory distinction between reckless manslaughter, and depraved indifference murder, and that the statutory definition of depraved indifference murder is unconstitutionally vague.

Certainly this is not true on the face of the statutes and Petitioner apparently does not so contend. A persistent series of judicial glosses placed on the statutory use of "depraved indifference murder," by New York's highest court seems to have, in effect, removed any distinction between the two crimes. This, it is contended, thereby violates the constitutional rights of persons convicted under the more serious of the two offenses.

There is a statutory definition of recklessness found in Penal Law Section 15.05. A person acts recklessly "when he is aware of and consciously disregards a substantial and unjustifiable risk that [a result described by a statute defining an offense] will occur or that such circumstances exist." "The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

There are a number of reported cases in the New York courts at all levels holding that the statutory reference to depraved indifference murder is not so vague as to violate substantive due process or equal protection rights of defendants. The words do possess a clear meaning in the general speech of the people and standing alone should be sufficient to give

adequate warning to a non-lawyer member of the public as to what conduct is rendered unlawfully by the statute. Classic textbook definitions about: throwing the classic squib into the market place is depraved indifference. The New York Court of Appeals held in *People v. Jernatowski* 238 NY 188 (1924) that firing two or more shots from the street into a house where the Defendant knew that human beings were present, and killing one of the occupants constituted depraved indifference murder. In *People v. Poplis* 30 NY 2d 85, 87 (1972), the New York Court of Appeals upheld the statute in a situation where "repeated brutal, callous and inhuman beatings" inflicted on a small child over several days resulted in injuries producing death.

Later, in *People v. Register* 60 NY 2d 270 (1983), cert. den. 466 US 953 (1984), the New York Court of Appeals considered a factual situation where the Defendant, intending to shoot one Mitchell, shot and killed another person. This case concerned primarily the issue of voluntary intoxication as bearing on intent, and arose in the context of a shooting incident in the early morning in a crowded saloon. The Court in *Register* held that the statutory phrase "under circumstances evincing a depraved indifference to human life" referred only to the factual setting in which a crime occurs and contrasted the case with manslaughter in the second degree by holding that the "statute requires in addition not only that the conduct which results in death present a grave risk of death, but that it also occur under circumstances evincing a depraved indifference to human life". The Court held "this additional requirement refers to neither the ***mens rea*** or the ***actus reus***. If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur - objective circumstances which are not subject to being negatived by evidence of Defendant's intoxication." The Court also held that in a "depraved mind

murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death (*Register*, 60 NY 2d 276). It went on to hold that the phrase refers to the "wantonness of Defendant's conduct and converts the *substantial* risk present in manslaughter to a *very substantial* risk present in murder (Id at p. 276-277). This seems to be a largely circular definition worthy of the committee that wrote the International Revenue Code, and tell us not very much. The dissenting opinion of Judge Jasen observed, and this Court agrees that the *Register* opinion "effectively eviscerated the distinction between manslaughter in the second degree, Penal Law Section 125.15(1) and murder in the second degree, Penal Law Section 125.25(2) with respect to the accused's state of mind", *Register* 60 NY 2d 282.

Later in *People v. Roe* 74 NY 2d 20 (1989), arising out of a killing resulting from Russian roulette (described by the perpetrator as Polish roulette), a majority of the Court, following *Register*, held that depraved indifference murder differs from manslaughter only in that the actor's reckless conduct must be imminently dangerous and present a grave risk of death, while in manslaughter, the conduct need only present a less substantial risk of death. This constitutes another play on words substantially similar to the definition imposed by the Court in *Register* and evoked a dissent by Judge Bellacosa, in which he observed that the majority "finalizes the obliteration of the classical demarcation between murder and manslaughter in this state" *Roe* 74 NY 2d at 29.

Later cases which continued this anomalous construction placed on the statute initially in the *Register* case include *People v. Cole* 85 NY 2d 990 (1995) and *People v. Johnson* 87 NY 2d 357 (1996). In the latter case, the Court of Appeals held that

the language was not unconstitutionally vague, because conduct with depraved indifference to human life is well understood.

This Court agrees that the concept of depraved indifference to human life is well understood, and is essentially self-defining notwithstanding the confusing glosses placed on the statute by *Register* and its progeny. But when two different statutes are construed by New York's highest Court to reach the same conduct, or indistinguishable conduct, and one carries a far lesser penalty, allowing a grand jury to choose to indict for either one is clear denial of equal protection.

More likely, once the jury concluded that self defense was not involved, this case really became one of intentional homicide.[1] The opportunity to submit what is at least by appearance a lesser included offense to intentional murder to the jury, as was done in this case, allows hesitant compromises to reach a verdict under conditions such as in this case, where they were apparently reluctant to convict Mr. Jones of intentional murder. There is nothing in our constitutional jurisprudence to prevent this.

Clearly it cannot be said that the statute is vague as applied in the case of a person who deliberately pumps two shots into the neck of someone who is lying on the ground at a distance of two feet. It is ordinarily thought that one who has received from a statute fair warning of the criminality of his own conduct, is not entitled to attack it because the language would not give similarly fair warning with respect to other conduct which might be within its broad and literal ambit. *Parker v. Levy* 417 US

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[1]While New York law requires a person asserting self-defense to "retreat to the wall", in practice juries tend to apply the standards of the OK Corral when the facts show a killing really was committed in self-defense.

733, 756 (1973); *United States v. Rybicki* 287 F.3d 257, 263 (2d Cir. 2002).

In most cases, where a penal statute is found unconstitutionally vague as applied, the result is that the accused goes free. This is not such a case, because the conduct of which Mr. Jones was convicted, as apparently viewed by the jury, would have resulted in a conviction for the lesser crime of reckless manslaughter. That the New York Court of Appeals has conflated the two statutory crimes is a matter of consideration concern to this Court. That the New York caselaw has merged this offense with the less serious available charge of manslaughter 2d, raises a serious issue of equal protection, and a strong possibility of prosecutorial discrimination against minorities or unpopular defendants. This Court concludes that the conviction for depraved indifference murder as applied to the facts of the case as the jury must have found them violated Petitioner's Constitutional right to the equal protection of the laws, as well as substantive due process. There was no rational basis by which a grand jury could chose to indict in this case for depraved indifference murder as opposed to reckless manslaughter, and the trial jury was denied the opportunity to choose between two identical crimes, one of which carries a far lesser penalty. A rational jury could not be expected to differentiate between a "grave risk of death" and a "substantial risk of death", as required by the New York Court of Appeals. This is a distinction without a difference; a trial jury simply cannot slice the salami that fine, as Judge Bellacosa and Jasen in dissent have pointed out for all to see.

Exhaustion

This Court has left the disputed issue of exhaustion for the last, because the adequacy of exhaustion is best tested by considering that which is to be exhausted.

Petitioner argues, and this Court agrees, that in the context of this case, raising in the state court the issue of insufficiency of the evidence was sufficient to raise "inextricably intertwined with") a challenge to the statutory criteria for distinguishing reckless manslaughter from depraved indifference murder.

The requirement for exhaustion is not intended to exhaust the petitioner or his or her lawyers, but is designed to give the state courts the opportunity to address and correct violations of Constitutional rights. That purpose is fulfilled when the state court has a fair and meaningful chance to grant relief on what is substantially the same claim raised in federal court. *O'Sullivan Boerckle* 526 U.S. 838, 844 (1999) *Vasquez v. Hillary* 474 U.S. 254, 257 (1986). In the context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.

Conclusion

Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was permitted to convict him of the most severely punished of two statutory crimes which under the state's reported decisions had become one. The Writ shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. The Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality.

SO ORDERED.

Dated: White Plains, NY
May 22, 2002

Charles L. Brieant, U.S.D.J.